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NO. 73-531

IN THE

Supreme Court of the United States

October Term, 1973

SHEARN MOODY, JR., *Petitioner*

v.

UNITED STATES OF AMERICA and GERALD T. CULVER, Special Agent, Internal Revenue Service, and E. O. BUCK, Receiver for W. L. Moody & Company, Bankers, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Shearn Moody, Jr., respectfully prays that a Writ of Certiorari issue out of and under the seal of this Court to review the decision and Judgment of the United States Court of Appeals for the Fifth Circuit rendered on July 23, 1973, which affirmed the Trial Court's Judgment in favor of Respondent, United States of America and Gerold T. Culver, Special Agent, Internal Revenue Service.

OPINIONS BELOW

The original Opinion of the United States District Court for the Southern District of Texas, rendered January 16,

1973, is reported in 356 F.Supp. 370 (Appendix, p. 21). The Opinion of the Fifth Circuit, dated July 23, 1973, is unreported and is reprinted in the Appendix, p. 42.

JURISDICTION

The Judgment of the Fifth Circuit was rendered on July 23, 1973, and is reprinted in the Appendix, p. 46. Petitioner has filed a timely Petition for Rehearing in the Fifth Circuit, and Petition was denied on August 13, 1973, and is reprinted in the Appendix, p. 47. The jurisdiction of this Court is invoked under the authority of Title 28, Sec. 1254(1), and Rule 19(b) of the Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Whether an IRS Summons for an individual's records is issued for an improper purpose when issued by an IRS Special Agent pursuant to an investigation of the individual taxpayer, entirely criminal in nature, with the object of discovering and proving tax fraud by the taxpayer.

2. Whether the Trial Court's holding, affirmed by the Fifth Circuit, that one claiming the privilege against self-incrimination *must* have possession, title and control over the records sought, is correct.

3. Whether the mere fact that an individual's records are in the Court-ordered possession of a Temporary Receiver legally bars such individual's right to assert his Constitutional Fourth and Fifth Amendment privileges.

4. Whether the failure to object to and appeal from an Order of the Court appointing a Temporary Receiver in equity to take an individual's assets and records

amounts to a voluntary transfer and thus a waiver of the individual's Constitutional privilege against self-incrimination, as a matter of law.

5. Whether the compelling of production of an individual's records, pursuant to an SEC Subpoena naming and directed to an assumed name under which an individual is doing business and executed upon an employee of said individual without any notice, service, Subpoena or warning to the individual owner of the records sought is unlawful and in violation of the record owner's Fourth and Fifth Amendment rights.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Internal Revenue Code of 1954, 26 U.S.C. § 7602; Amendment IV to the Constitution of the United States, U.S.C.A. Const. Amend. IV; and Amendment V to the Constitution of the United States, U.S.C.A. Const. Amend. V, are set forth in the Appendix, p. 48.

STATEMENT

An Administrative Summons was issued by Gerald T. Culver, Special Agent of the Internal Revenue Service, and served upon Mr. E. O. Buck, Temporary Receiver, directing him to appear at the office of the Internal Revenue Service, to produce records described therein, which are substantially all records of Shearn Moody, Jr., pertaining to his pivate banking operation under the assumed name of W. L. Moody & Company, Bankers (Unincorporated), for the years 1968, 1969, 1970 and 1971. (Gov't. Ex. 1). E. O. Buck, Temporary Receiver, did not honor said Subpoena, and Petition to Enforce said Summons was filed herein by Gerald T. Culver, Special Agent, and United States of America, in the U. S. District Court,

having jurisdiction pursuant to 26 U.S.C.A. § 7602 and § 7604, in which proceeding Shearn Moody, Jr., intervened.

At the time of service of the IRS Summons, E. O. Buck, the Temporary Receiver, had custody of Shearn Moody, Jr'., records located at his bank building at 2302 Church, in Galveston, Texas, his bank-related assets and the bank building itself, pursuant to Orders dated September 6 and 7, 1972, in that certain case styled "Securities and Exchange Commission v. W. L. Moody & Company, Bankers (Unincorporated), and Shearn Moody, Jr.," numbered 72-G-167, now pending in the U. S. District Court (Appendix, pp. 64). W. L. Moody & Company, Bankers (Unincorporated), is an assumed name under which Shearn Moody, Jr., operated a private bank, beginning early in 1968. W. L. Moody & Company, Bankers (Unincorporated), is not a legal entity. Shearn Moody, Jr., conducted his banking business under said assumed name in the bank building in question, and he is the sole owner of the land, building, all of the banking equipment, loans, assets and records located thereat.

The SEC, pursuant to Order directing a private investigation, (Gov't. Ex. 2), issued a Subpoena Duces Tecum addressed to W. L. Moody & Company, Bankers (Unincorporated), and served such Subpoena on E. Douglas McLeod, an employee of Shearn Moody, Jr., which Subpoena demanded substantially all of the records at the bank (Appendix, p. 64). McLeod was given his *Miranda* type warning and, on July 13, 1972, under compulsion of such Subpoena, the said McLeod did make all of Moody's bank records located at the bank available to the SEC, which they thereafter undertook to view, copy extensively and have access to all such records, until

custody of such records was delivered to the Temporary Receiver on September 6, 1972.

When the SEC Subpoena was served and executed, Shearn Moody, Jr., was not personally contacted, was not served with a Subpoena of any sort nor given any warning of his privilege against self-incrimination, until August 3, 1972, some twenty-one (21) days after the records in question were taken by the SEC, pursuant to the Subpoena served upon McLeod.

On August 3, 1972, some twenty-one (21) days after the SEC had already secured Shearn Moody, Jr's., records, he was, for the first time, given his warning by an officer of the Commission and advised of his right to employ counsel and his privilege against self-incrimination under the Fifth Amendment, in response to which he did execute a paper, acknowledging having been shown the Subpoena served upon McLeod and stating that it was agreeable with him for the investigation of the SEC to continue.

On September 6, 1972, Shearn Moody, Jr., and his then Attorney agreed to the entry of an Order sought by the SEC enjoining him and the bank from any further actions or activities in violation of the Securities Act, and, at that time, the Court appointed a Temporary Receiver, pursuant to the request of the SEC. Neither Shearn Moody, Jr., nor his Attorney agreed to the appointment of such Temporary Receiver, but did not formally object to such appointment.

Petitioner contested the IRS Summons on the grounds that enforcement of the Summons would violate Petitioner's Fourth and Fifth Amendment rights under the United States Constitution, that the IRS had in its possession, or access to, substantially all of the documents and records sought, and that the primary and overriding pur-

pose of the issuance of such Summons was to obtain evidence for criminal prosecution of Petitioner.

The question of enforcement of the IRS Summons was tried before the Court, resulting in the Trial Court's Order of January 16, 1973, directing E. O. Buck to comply with the IRS Summons, from which Order Petitioner perfected an appeal to the Fifth Circuit, which affirmed the Trial Court's Order and rendered Judgment in favor of United States of America and Gerald T. Culver, Special Agent, Internal Revenue Service, on July 23, 1973, and it is from this Judgment Petitioner seeks a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. The decision of the District Court, affirmed by the Fifth Circuit, holding that the IRS Administrative Summons, even if clearly and admittedly used solely to conduct an investigation to gather evidence to prove criminal fraud, is enforceable and for a legitimate purpose. so long as there is open a *possibility* of civil tax liability.

2. The Trial Court's holding, affirmed by the Fifth Circuit, that one claiming the privilege against self-incrimination *must* have possession, title and control over the records sought, is contrary to this Court's holding in *Couch v. U.S.*, 34 L.Ed.2d 548 (1973), which Opinion clearly recognizes that situations may well arise where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave their personal compulsions upon the accused substantially intact. This holding is also contrary to the holdings in other Circuits. See *Schwimmer v. United States*, 232 F.2d 855 (C.A. 8th 1956) and *United States v. Guterma*, 272 F.2d 344 (C.A. 2d 1959).

3. This case, for the first time, raises the question of the right of the IRS to issue an Administrative Subpoena to a Temporary Receiver in equity, with the attendant questions of the nature of such Receiver's possession of records and the equity Court's duty in regard thereto, which raises an important question relating to the administration and enforcement of the Revenue Laws, upon which no Federal Court has previously written and which this Court should consider.

4. This case involves the first time, so far as is known to Petitioner, that the SEC has moved against a non-entity private banking operation individually owned, alleging violations of the Securities and Exchange Act, securing the individual's bank-related records through an Administrative Subpoena Duces Tecum naming the non-entity bank and executed upon an employee of the individual having naked possession of said individual's records located in the individual's owned bank building, and the holding of the Court below is contrary to *Boyd v. U.S.*, 116 U.S. 616, 29 L.Ed. 746 (1886), and *Schwimmer v. U.S.*, supra.

1. The decision of the District Court, affirmed by the Fifth Circuit, holding that the IRS administrative summons, even if clearly and admittedly used solely to conduct an investigation to gather evidence to prove criminal fraud, is enforceable and for a legitimate purpose, so long as there is open a *possibility* of civil tax liability.

Petitioner does not argue with the now well-settled law that a Special Agent is authorized, pursuant to 26 U.S.C. § 7602, to issue an Internal Revenue Summons in aid of a tax investigation with civil and possible criminal con-

sequences, as recited by this Honorable Court in *Couch v. U.S.*, supra. In that Opinion, however, the Court pointed out that the investigation was clearly a joint civil and possibly criminal investigation. However, the case in point is substantially different, in that the Trial Court found, as a matter of fact, that, though the IRS called its activity with respect to the Moody matter a joint investigation, it was joint in name only. *United States v. Buck*, 356 F.Supp. 375. The Trial Court found, as a matter of fact: that information of possible fraud came to the Intelligence Division from a government agency other than the IRS (ff 18); that the Special Agent did not even confer with the Auditing Agent, before issuing the Summons or filing suit; that the Special Agent had reviewed neither the records which the Auditing Agent had copied nor the other contents of the Auditing Agent's work file; that there had been no coordination between the two Agents; and that the Special Agent's investigation was entirely criminal in nature, with the object of discovering and proving tax fraud by the taxpayer. (Appendix, p. 28, ff 19).

The Trial Court enforced the Summons, however, even though it was in fact not a joint investigation, because the correctness of Moody's Returns is still at issue. (Appendix, p. 50, CL 14).

Petitioner does not argue with the holding of *Donaldson v. U.S.*, 400 U.S. 517, 27 L.Ed.2d 580 (1971), recognizing that such a Summons issued in connection with a *true* joint investigation is for a proper purpose, but the facts of the Moody case fall far short. In fact, it was conceded that a Closing Letter had been executed with regard to Moody's 1968 Return, and that no IRS request to open that year had been made. Accordingly, the Special Agent's demand for 1968 records can. there-

fore, only relate solely to the purpose of criminal investigation.

Petitioner has tried in vain to think of any situation where a criminal investigation of a taxpayer would not necessarily involve the possibility of civil consequences. Accordingly, the Trial Court below has held, in effect, that, even where the *sole* purpose of the issuance of an IRS Administrative Summons is to secure evidence to prosecute the taxpayer for criminal fraud, such Summons is issued for a legitimate purpose.

The law, as stated by this Honorable Court in *Couch*, is that issuance of a Summons in aid of a tax investigation with a civil and possible criminal consequences is proper, *not* that such issuance of a Summons in aid of a tax investigation with criminal and possible civil consequences is proper.

2. The Trial Court's holding, affirmed by the Fifth Circuit, that one claiming the privilege against self-incrimination *must* have possession, title and control over the records sought, is contrary to this Court's holding in *Couch v. U. S.*, 34 L.Ed.2d 548 (1973), and to the holdings in other circuits.

3. This case, for the first time, raises the question of the right of the IRS to issue an administrative subpoena to a temporary receiver in equity, with the attendant questions of the nature of such receiver's possession of records and the equity Court's duty in regard thereto, which raises an important question relating to the administration and enforcement of the revenue laws, upon which no federal court has previously written and which this Court should consider.

The Trial Court held:

> "One claiming the privilege (against self-incrimination) must have possession, title and control over the property sought,"

and further held:

> "Because the records sought are in the Receiver's hands, Moody cannot legally assert Constitutional claims to prevent their production."

United States v. Buck, 356 F.Supp. 376, C.L. 2).

The Trial Court apparently has construed the holding of this Honorable Court in *Couch v. U.S.*, supra, as holding that any relinguishment of possession and control of a taxpayer's personal records to a third party under any circumstances constitutes a waiver of that taxpayer's right to claim the privilege against self-incrimination upon compulsory production of such records in connection with a proceeding where the taxpayer would other wise be entitled to claim such privilege. However, this Court, in *Couch*, supra, though pointing out that actual possession of the document bears the most significant relationship to the Fifth Amendment protection against compulsion, recognized certain exceptions where constructive possession is so clear or the relinguishment of possession is temporary and insignificant, so as to leave the personal compulsions upon the accused substantially intact.

It is uncontroverted that Moody did not consent to the Court's appointing Mr. Buck as Temporary Receiver upon request of the SEC, even though he did not formally object or appeal the Trial Court's ruling. The Court's holding then, apparently, is that failure to object to a

Court Order appointing a Temporary Receiver in equity is no different than consenting to such appointment. The Trial Court's finding that failure to object to a lawful Court Order amounts to consent is so novel that Petitioner has found no cases even construing this possibility.

The IRS contends, and the lower Courts agree, that the mere fact of possession of Moody's private records by the Temporary Receiver in equity is sufficient to enable the IRS to subpoena such records, and that Moody has no right to assert his Constitutional privileges under the Fourth and Fifth Amendments. Respondents, however, cited no cases pertaining to Temporary Receivers appointed by a Court in equity for a very limited purpose, such as taking over a private banking operation for the protection of not only the depositors but its owner.

The Courts below rely upon cases concerning the inability of a bankrupt or a potential bankrupt to assert Constitutional privileges against seizure by another governmental agency, where the records are in the hands of a Federal Bankruptcy Receiver or Trustee. *Dier v. Banton and Ehrich,* 262 U.S. 147, 67 L.Ed. 915 (1923), and *In the Matter of Harris,* 221 U.S. 274, 55 L.Ed. 732 (1911).

The holding in *Dier v. Banton,* supra, does not and should not apply to a Temporary Receiver appointed under the equity jurisdiction of a Court, since the Federal Bankruptcy Act, rather than the common law, places title and possession in the Bankruptcy Trustee or Receiver.

The nature of "possession," which is most directly related to the Fifth Amendment right, has been variously described by the Courts considering Court-appointed

Receivers. For example, in *Union National Bank of Chicago v. Bank of Kansas City,* 136 U.S. 223, 34 L.Ed. 341 (1890), the Court said:

> "A Receiver derives his authority from the act of the Court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed; the utmost effect of his appointment is to put the property from that time into his custody as an officer of the Court for the benefit of the party ultimately proved to be entitled, but not to change the title or even the *right of possession* in the property." (Empasis added)

The Court of Appeals of the Third Circuit, in *U.S. v. Beaver,* 252 F.2d 486 (1957), considered a case where a State Court had appointed a Temporary Receiver in a partnership dispute, in which the question of priority of liens arose. The question before the Court was whether or not rights and title to the assets passed to the Temporary Receiver or remained in the owner, subject to the Receiver's right to deal with it under the Court Order. The Court pointed out that a Temporary Receiver is but a mere *custodian* of property and that title remains in the owner, pointing out that there is no question but that the owning partner retained and possessed a property right in any surplus due under the Contract under the Receivership.

The Supreme Court has variously stated, in construing a Court-appointed Receivership, that the property in the Receiver's hand was not, in a legal sense, in the Receiver's possession, but in possession of the Court, whose appointee he is. *Thompson v. Phoenix Insurance Co.,* 136 U.S. 287, 34 L.Ed. 408 (1890); and *Fosdick v. Schall,* 99 U.S. 235, 25 L.Ed. 339 (1879).

The only case squarely in point is *Sidney J. Clark v. State of Delaware*, 269 Atl. 2d 259 (Del. 1970), which, though, of course, is not binding upon this Honorable Court, is the only case having considered the attempt of a governmental agency to obtain books and records in the custody of a Court-appointed Receiver. The Delaware Court recognized the bankruptcy cases concerning a bankruptcy's Fifth Amendment waiver, saying:

> "The situation before us is entirely different from that of Trustees in bankruptcy who obtain records as a result of their appointment and have absolute title to those records. As to general equity Receivers, however, the only claim they have to possession is pursuant to an Order of Court of Chancery, but that Order does not vest title of the records in them, and they hold them as officers of the Court of Chancery in custodia legis. This, it seems to us, means that the Receivers do not have absolute disposition of these records and that the person from whom they took custody has some control remaining, concerning the disposition of them. . . .
>
> "In this appeal, we are concerned with books and records in the hands of a Receiver who holds them on an ad interim basis for the protection of the creditors of the owner. We think that the voluntary turnover of such books and records by the owner to a Receiver under these circumstances does not amount to voluntary waiver of his privilege against self-incrimination. . . ."

The rationale of the Court's decisions in the bankruptcy cases does not apply, and should not apply, to cases involving Court-appointed Temporary Receivers in equity, since the paramount and overriding requirements of the Bankruptcy Act and the businessman's conduct of

commercial relationships which he is deemed to enter into are subject to the application of bankruptcy laws, and thus present an overriding consideration for some impairment of his Constitutional privileges. *U. S. v. Hoyt*, 53 F.2d 881 (1931). Such overriding consideration is not present in Temporary Receiverships under Court supervision, since the nature of possession is substantially different than that in bankruptcy cases, Temporary Receiverships arising under many and varied situations calling for equitable intervention by the Court.

The Supreme Court, in *Couch v. U. S.*, supra, found, as a matter of fact, that the taxpayer had voluntarily and systematically delivered posssession of her records to an independent contractor accountant for many years, allowing such accountant to retain possession of her records.

Moody's records, at the time of the appointment of the Temporary Receiver were or had been seized and held by the Securities and Exchange Commission, under its previously issued Subpoena. It is highly debatable as to what possession he had, prior to the appointment of the Temporary Receiver, since his records were in the constructive possession of the SEC, pursuant to its previously issued Subpoena. In any event, the Temporary Recevier's possession came about as a result of an Order of the Court below, which belies any voluntariness in delivery of possession by the taxpayer.

The Petitioner would urge the Court that there is no good reason to extend the waiver of Constitutional rights bankruptcy proceedings to a further diminution of Constitutional rights in cases involving Temporary Receivers appointed by Courts in equity.

4. This case involves the first time, so far as is known to Petitioner, that the SEC has moved against a non-entity private banking operation individually owned, alleging violations of the Securities and Exchange Act, securing the individual's bank-related records through an administrative subpoena duces tecum naming the non-entity bank and executed upon an employee of the individual having naked possession of said individual's records located in the individual's owned bank building, and the holding of the Court below is contrary to *Boyd v. U. S.*, 116 U.S. 616, 29 L.Ed. 746 (1886), and *Schwimmer v. U. S.*, supra.

The compelling of production of an individual's records, pursuant to an SEC Subpoena, named and directed to an assumed name under which an individual is doing business and executed upon an employee of said individual, without notice, service, Subpoena or warning to the individual owner of the records sought, is unlawful and in violation of the record owner's Fourth and Fifth Amendment rights. See *U. S. v. White*, 322 U.S. 694, 88 L.Ed. 1542 (1944).

It was uncontroverted in the Trial below that W. L. Moody & Company, Bankers (Unincorporated), is an assumed name under which Shearn Moody, Jr., operated a private bank, beginning early in 1968, and that W. L. Moody & Company, Bankers (Unincorporated), is *not* a legal entity. Moody conducted his banking business under said assumed name in a bank building in Galveston, and he is and was the sole owner of the land, building, banking equipment, loans, assets and records located thereat.

The SEC, for reasons of its own, but arguably to avoid a direct confrontation and demand upon Shearn Moody, on July 13, 1972, executed formally on Moody's employee, McLeod, the SEC Subpoena addressed to the nonentity bank, demanding substantially all of Shearn Moody's private papers and records related to his operation of the bank.

Shearn Moody, Jr., the admitted owner of the bank, was not personally contacted, was not served with a Subpoena of any sort, or given any warning of his privilege against self-incrimination, prior to the SEC's seizing such record and initiating such search. In fact, it was not until nineteen (19) days after the SEC secured access to Moody's records that any contact was made between the SEC Agents and Moody.

Pursuant to the SEC Subpoena, McLeod did deliver and make available to the summoning officer all records described in the Subpoena and, thereafter, the Agents of the Securities and Exchange Commission undertook to view, copy extensively, have access to all such records and, during the investigation, the Agents searched and went through every desk drawer and every locked desk, being extremely thorough.

The Fifth Circuit has apparently abandoned its holding in *Harrison v. Prather*, 404 F.2d 267 (C.A. 5th 1968), since in affirming the Trial Court, it apparently holds that service on a mere employee of Petitioner who had mere naked possession of the premises and records of his employer, as opposed to serving Moody himself, the owner and possessor of the banking records, is lawful. No Warrant authorizing such search by the SEC Agents was issued, and the sole authority for said Commission's en-

trance into the bank and the taking of custody, possession and control of the records was the Subpoena Duces Tecum executed upon Moody's employee, McLeod.

Petitioner would urge that the bank, being a private commercial building owned by Moody, is subject to the same freedom from unreasonable official entries as is his residence. *See v. City of Seattle*, 387 U.S. 541, 18 L.Ed.2d 943 (1967). This Honorable Court in *Camara v. Municipal Court*, 387 U.S. 523, 18 L.Ed.2d 930 (1967), found that use of a Search Warrant is necessary, even in a case where a State Court has found that the search was "part of a regulatory scheme which is essentially civil rather than criminal in nature."

Respondent urges that, irregardless of the validity or invalidity of the Subpoena Duces Tecum of the Securities and Exchange Commission, by virtue of an Attorney's having appeared at the bank building at the time of the execution of the Subpoena, purporting to represent the bank, that he was in fact representing Petitioner, who owned the bank, and that his mere presence constituted some sort of waiver or abandonment of Moody's right to urge his Constitutional privileges, making legal the Subpoena Duces Tecum, which was illegal on its face.

The Court in *Schwimmer v. U. S.*, supra, considered a Grand Jury Subpoena having been issued to a company which was merely storing records of Attorney Schwimmer pertaining to some of Schwimmer's clients. The Attorney filed a Motion to Quash on Fourth Amendment grounds. With regard to Schwimmer's contention, the Court said:

> "We are accordingly unable to see any merit in the argument made by the Government here that, since

> the books and papers physically were in the possession of the Dean Rubber Manufacturing Company and the Subpoenas involved were issued against it, Schwimmer had no basis for claiming unreasonable search and seizure against him. . . .
>
> "We think that Schwimmer legally had such possession, control and unrelinquished personal rights to the books and papers as not to enable the question of unreasonable search and seizure to be escaped as a mere procedural device of compelling a third party with naked possession to deliver them."

Petitioner would urge the Court that the Securities and Exchange Commission illegally obtained Moody's private records by reason of an unreasonable search and seizure, by the mere procedural device of naming a non-entity bank in its Subpoena and executing the Subpoena upon a mere employee with naked possession of Moody's records.

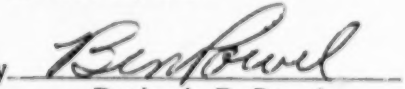
CONCLUSION

The Fifth Circuit, in affirming without written Opinion of the Trial Court's published Opinion, has taken unprecedented steps beyond this Court's pronouncements, which delicately balance the needs for proper enforcement of the federal tax laws and the need to protect the Constitutional rights of the individual, the effect of which is to place in the hands of the IRS and other governmental agencies the power to blatantly force an individual's records from him to secure evidence to criminally convict the individual by merely raising the possibility of *possible* civil consequences. The holding of the Court below will handicap and discourage the use of equitable Receiverships, the use of which would effectively strip the indi-

vidual of his Constitutional rights with regard to his expected privacy of assets and records in connection therewith. We respectfully urge that this Court, and not the Court below, should determine any further extension of encroachment on Constitutional rights of the individual in enforcement of tax laws and whether or not the use of an equitable Receivership by an individual strips him of his expectancy of privacy of his assets and records in connection therewith. And we respectfully urge that the decision below be reversed.

Respectfully submitted,

McLeod, Alexander, Powel & Apffel, Inc.

By 

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true copy of the foregoing Petition for Writ of Certiorari upon each of the following:

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510 Gulf Building
Houston, Texas 77002,

Attorney for E. O. Buck,
Temporary Receiver.

by depositing the same in the United States Mail, Certified Mail, Return Receipt Requested, with sufficient postage prepaid thereon, addressed to such Attorneys at their respective last known address, as stated above, on the 22nd day of September, 1973.

Benjamin R. Powel

APPENDIX

OPINIONS BELOW

MEMORANDUM AND ORDER

(Caption Omitted)

(Filed January 16, 1972)

James H. Jeffries, III, Tex Division, United States Department of Justice, Washington, D.C.;

Anthony J. P. Farris, United States Attorney, and William L. Bowers, Jr., Assistant United States Attorney, Houston, Texas, for Petitioners.

Charles Sapp and W. Robert Brown, of Liddell, Sapp, Zivley & Brown, Houston, Texas, for Respondent.

V. W. McLeod and Benj. R. Powel, of McLeod, Alexander, Powel & Apffel, Galveston, Texas,

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This is a suit to obtain judicial enforcement of an administrative summons. Petitioners are the United States of America and Gerald T. Culver, a Special Agent with the Intelligence Division of the Internal Revenue Service (IRS). Respondent is E. O Buck in his capacity as Temporary Receiver for W. L. Moody & Co., Bankers. (Unincorporated), a sole proprietorship owned and formerly operated by Intervenor, Shearn Moody, Jr. Receiver was appointed in an action brought against Bank and Intervenor by the Securities and Exchange Commission (SEC) and docketed as Civil Action No. 72-G-167. The

summons required Receiver to appear before Culver and produce certain records of the Bank. Receiver did not comply with the summons and this enforcement proceeding was instituted pursuant to Sections 7402(b) and 7604 of Title 26, the United States Code.

Moody, the taxpayer whose records are being sought, requested and was granted permission to intervene as the real party at interest. Donaldson v. United States, 400 U.S. 517 (1971). Counsel for Intervenor actively presented the case against enforcement while Receiver's counsel, approximately, has stood by, awaiting the Court's decision. Oral testimony was received on December 4 and 11. In addition, Intervenor and Petitioners have submitted briefs.

FINDINGS OF FACT

1. On July 10, 1972, pursuant to an SEC order authorizing an investigation, Larry Burks, Esq., an attorney for the SEC, prepared a subpoena duces tecum addressed to W. L. Moody & Co., Bankers (Unincorporated). The subpoena requested access to substantially all Bank records. Because the Bank is a sole proprietorship owned by Intervenor, its records are the personal property and records of Moody. They have been so considered by all parties. The rights and liabilities of Moody and Bank are coincident. Moody is the Bank and the Bank is Moody. The Bank is only one of Moody's numerous assets held by the Receiver, pursuant to this Court's order.

2. On July 10, E. Douglas McLeod, Executive Vice President of Bank, was served with the SEC subpoena at the Bank, Tremont and Church Streets, Galveston, Texas. McLeod was fully advised of his constitutional

rights. McLeod offered to provide immediate access to the records. Nonetheless, James E. Sims, Esq., SEC attorney in charge, postponed a request for compliance until an attorney for Moody could be present. Upon later arrangement between Sims and representatives of Moody, July 13 was selected as the date upon which compliance would commence.

3. On July 10, and in the presence of Sims, McLeod attempted to contact several attorneys who had represented Moody in matters concerning the Bank. McLeod finally reached A. R. Schwartz, an attorney. Schwartz conferred with Sims on July 10 and 11, at which time he stated that he was not qualified to properly counsel Moody in the matter and indicted to Sims that the firm of Sims, Anderson, Alper & Spencer, of Miami, Florida, would represent Moody. The firm had previously represented Moody. On July 12, Roger Bridges, Esq., of that firm arrived in Houston, and acting as attorney for Moody, conferred with Sims. James Wohlenhaus, a Moody employee and adviser, had told McLeod that Bridges would represent Moody.

4. Between July 10 and 13, McLeod talked by telephone to Moody and met with Moody at his ranch. Moody knew of the SEC subpoena and of McLeod's intention to comply with it. Although he expressed anger and aggravation over the investigation, Moody did not direct McLeod to resist the subpoena. Moody did nothing to restrict the scope of or compliance with the SEC investigation. McLeod's compliance with the SEC subpoena was authorized by Moody.

5. On July 13 Messrs. Sims and Burks, SEC attorneys, and John Arnold, an SEC accountant, appeared at

Bank to demand compliance with the subpoena. Messrs. McLeod, Bridges and Trenton Torregrossa, Vice President and Cashier of Bank, were present. The proceedings were recorded (Moody Exhibit 3). Although Bridges, legal counsel for Moody, acknowledged his familiarity with Moody's constitutional privilege, he did not assert the privilege for Moody and made no objection to Moody's compliance with the SEC subpoena. Bridges stated that compliance was not to be considered a waiver of any right Moody might have, but did not identify any particular right as being reserved. The Court finds that Moody complied with the SEC subpoena after careful consideration by and upon advice of duly authorized and competent counsel.

6. The SEC order authorizing the investigation (Government Exhibit 2) stated facts which if true would constitute violations of the Securities Act of 1933, as amended, 15 U.S.C. § 77a et seq., and the Securities Exchange Act of 1934, as amended , 15 U.S.C. § 78 et seq. The order identified the specific sections of the laws involved, to wit: Sections 5(a), 5(c) and 17(a) of the Securities Act, and Section 10 (b) of the Securities Exchange Act, together with Rule 10b-5 adopted pursuant thereto. Violations of said sections carry with them criminal sanctions, 15 U.S.C. § 77v and 15 U.S.C. § 78ff. McLeod and Moody's counsel, Bridges, read and fully understood the implications of the order.

7. At the July 13 proceeding, Sims advised those present that the cited statutes concerned unregistered sales of securities and statutory fraud. Sims also informed McLeod and Bridges that if violations of other federal laws became evident, "the subjects of the investigation could be charged with violations of those other laws."

Thus, the Court finds that Moody through his agents and from their communications to him knew the criminal implications of the SEC investigation; and with such information, acted upon the advice of competent counsel.

8. On August 1 and 2, Moody appeared at Bank and asked Burks several questions concerning the SEC investigations. Burks declined to answer Moody's questions and told him the SEC was not there to help Moody. He suggested that Moody should confer with his attorney. Upon advice of counsel, Moody signed a short letter (Government Exhibit 3), dated August 3, which recited knowledge of the subpoena and stated, "it is agreeable with me for this investigation by the Securities and Exchange Commission to continue until further notice is given by me to the contrary." No contrary notice was given.

9. The investigation by the SEC in July and August of 1972 was very thorough. Commission representatives reviewed all Bank files and surveyed the contents of every desk. The SEC microfilmed a substantial part of the records located in the Bank. The investigators were provided an office in the bank building. Moody's employees assisted in locating and providing records for the investigators as requested.

10. The only records located in Bank which were not available for examination were two safety deposit boxes which were assigned to Moody as his personal boxes, as distinguished from certain boxes designated for the Bank's use. Upon request of a Moody employee who advised that the boxes contained Moody's personal records, the SEC agreed not to review the contents of those boxes. It did not do so.

11. On August 28, 1972, pursuant to a subpoena served August 8, Moody accompanied by attorneys Jerry G. Hill and Frank V. Ghiselli, Jr., appeared for oral examination before SEC officers Robert F. Watson, Larry Burks, and James E. Edwards, at Fort Worth, Texas. At the outset Moody was advised of the nature of the investigative examination and of his constitutional rights. Moody fully answered several questions concerning his holdings in various companies. Nonetheless, when asked a question concerning one or more securities transactions with one James Brewer, acting upon advice of his counsel Hill, Moody claimed the Fifth Amendment privilege against self-incrimination. Although Moody indicated a willingness to answer other questions, the SEC officers declined to ask further questions and terminated the oral examination. The invocation of the Fifth Amendment was to the single question and not a blanket assertion of the privilege.

12. Sims was informed on August 28, that the Commission, after review of the investigation, had authorized filing a civil lawsuit against Moody. The suit was to allege securities law violations in Moody's operation of the Bank and seek injunctive relief.

13. An August 29, Sims and Hill, accompanied by his client, Moody, met with the Court in chambers. They apprised the Court of past events and the imminent SEC suit against Moody. All were concerned about the financial condition of Moody's Bank. Hill and Moody expressed fear that filing the SEC lawsuit would cause a bankrupting run by anxious depositors, resulting in serious financial loss to Moody as well as to the depositors. Hill described attempts being made to convert certain of Moody's assets into cash, in order to meet the demands of depositors should a run occur. Upon the basis of these representations

and with approval of higher SEC authority, Sims agreed to refrain from filing suit immediately.

14. On September 6, having concluded that the assets would not be converted into cash as proposed, Sims requested another meeting with the Court. After this meeting attended by Sims and Hill, the lawsuit was filed, Civil Action No. 72-G-167.

15. The Complaint, Final Judgment, and Order Appointing Temporary Receiver were filed simultaneously on September 6. The wording of the Final Judgment and the Order had been the subject of intensive negotiations between Hill and Sims. The Final Judgment enjoined further violations of the securities laws. Moody consented and joined in its submission. The Order Appointing Temporary Receiver required that Receiver "take charge of all of defendant W. L. Moody & Co., Bankers, Unincorporated's assets and property, tangible or intangible, wherever located." Moody neither consented to nor opposed the latter Order. Moody did not assert any constitutional right or privilege with respect to any aspect of the assets and property (including the Bank records, of which the Receiver took charge pursuant to said Order). In substance, the transfer of such property and assets (including the Bank records), was voluntary. Prior to September 11, no reference to any private papers of Moody was made to the Court or to the Receiver.

16. On September 10 or 11, during a meeting with the Court, Hill advised the Court that the two safety deposit boxes, mentioned above, contained private papers of Moody as distinguished from Bank records, as to which Moody desired to assert his Fifth Amendment privilege. Hill requested that the two boxes be sealed and

immunized from inspection by either the Receiver or the SEC, pursuant to said privilege. The Court orally ordered the Receiver to comply with the request. The boxes were sealed and have not been opened either by the SEC or Receiver. This is the only occasion in which the Fifth Amendment was invoked during the proceedings in Civil Action No. 72-G-167.

17. Robert Coyle, Revenue Agent with the Audit Division of the Internal Revenue Service (IRS) has been investigating the correctness of Moody's tax returns for 1969 and 1970, two of the years involved in this proceeding. Copies of all Moody's records as requested by Coyle have been supplied for his examination in the offices of Moody's public accounting firm. Coyle has copied many of such records. Coyle has not recommended a criminal investigation of Moody's affairs. The IRS administrative subpoena and this enforcement proceeding did not result from Coyle's work.

18. Gerald T. Culver, Special Agent with the Intelligence Division of the IRS, issued and served the subject summons. The Intelligence Division generally investigates possible fraud by taxpayers, which implies potential criminal sanctions. Culver's investigation of Moody's affairs did not begin until September 1972. Information of possible fraud came to the Intelligence Division from a government agency other than the IRS. The Audit Division of the IRS did not initiate this investigation by the Intelligence Division.

19. The IRS calls its activities with respect to Moody a Joint Investigation because a Revenue Agent and a Special Agent work on it concurrently. The Court finds that at this time the investigation is joint in name only.

Culver did not confer with Coyle before issuing the summons or filing suit. He has reviewed neither the records which Coyle has copied nor the other contents of Coyle's work files. There has been no coordinated action between the two agents. Culver's investigation, which is the subject of this proceeding, is entirely criminal in nature with the object of discovering and proving tax fraud by the taxpayer.

20. Many of the records here sought by Culver have already been made available to and copied by Coyle. To require the taxpayer to again produce the records for IRS inspection and copying involves duplication of effort and expense. It is not unusual for the Internal Revenue Service, in the interest of time, to ask taxpayers for records which are already on file with the Service. While inconvenient to the taxpayer, this procedure has not been shown to impose an unreasonable burden in this case. It does not constitute harassment of the taxpayer Moody.

21. Some but not all of the records sought have been copied by the SEC during its investigation and are on twelve rolls of microfilm which have been made available by SEC to the IRS. The records sought are relevant to determining the taxpayer's income and tax liability. The IRS has a legitimate interest in seeking access to the complete, original documents rather than relying on incomplete copies made for purposes other than tax investigation. Although the records sought are numerous, the IRS summons is specific in its description of the exact records requested.

22. The IRS summons was served on Receiver October 31, 1972. It called for his appearance on November 19, 1972, during which time Receiver was actively engaged

in distributing funds to Bank depositors, pursuant to the order of this Court. An early distribution to depositors was considered a goal of the highest priority by the Court. The preparation necessary to comply with the summons would have interfered with the accomplishment of this goal. In failing to comply with the summons, the Receiver acted with the utmost regard for his responsibilities to both Moody and the depositors of Bank.

23. The Petition to Enforce the Summons was filed November 17. At that time the Receiver and his attorneys were involved in preparation of a Final Record to the Court. Consent to the petition would have prevented the early completion of this important task. Again, the Court finds that the Receiver acted responsibly in resisting the summons during November.

24. If the Court orders compliance with the IRS summons, Receiver will appear before the Special Agent and provide the requested records. The parties have stipulated that the receivership may be terminated without prejudice to the rights of the parties here. Thus if the receivership has ended and the records have been returned to Moody before the Court's order should become final, the records will be subject to discovery to the same extent ordered as if such records were in Receiver's possession and control.

CONCLUSIONS OF LAW

1. The records sought by the IRS in this proceeding are clearly relevant and material to a determination of Moody's taxable income for the years in question, and therefore the IRS has presented a prima facie case which justifies enforcement of the summons. See United States

v. Powell, 379 U.S. 48 (1964); Boren v. Tucker, 239 F.2d 767 (9th Cir. 1956).

2. By turning over the records of W. L. Moody & Co., Bankers (Unincorporated) to the Receiver without asserting a Fifth Amendment privilege against self-incrimination (except as to the two safety deposit boxes), Moody lost the right to assert that privilege here. Because the records sought are in the Receiver's hands, Moody cannot legally assert constitutional claims to prevent their production.

Generally, the privilege against self-incrimination does not encompass property which the individual has transferred to another person. One claiming the privilege must have possession, title and control over the property sought. When the individual has relinquished possession to another, he can no longer assert the privilege. Thus, this Court held in United States v. Baldridge, 281 F.Supp. 470 (S.D. Tex. 1968) (Ingraham, J.):

> The rule is well settled that a party has no standing to invoke the privilege against self-incrimination as to evidence in the possession of another person even though the evidence was originally obtained from the person claiming the privilege and regardless of the incriminating nature of the evidence.

Mr. Justice Powell most recently summarized this legal principle in stating:

> It is important to reiterate that the Fifth Amendment privilege is a personal privilege; it adhers basically to the person, not to information which may incriminate him. As Mr. Justice Holmes put it: 'A party is privileged from producing the evidence but

> not from its production.' Johnson v. United States, 228 U.S. 457, 458 (1913). The Constitution explicitly prohibits compelling an accused to bear witness 'against himself': it necessarily did not proscribe incriminating statements elicited from another . . . . It is extortion of information from the accused himself that offends our sense of justice.

Couch v. United States, No. 17-889 slip op. at 6 (U.S. Jan. 9, 1973), aff'g 449 F.2d 141 (4th Cir. 1971). See also Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 at 414 (1971) (Burger, C.J., dissenting).

The Fifth Amendment privilege against self-incrimination and the Fourth Amendment protection against unreasonable search protect the individual against official invasions of personal privacy. See United States v. White, 322 U.S. 694, 698 (1944). They protect the individual's reasonable expectations of security in body, mind and personality. When the individual freely exposes and transmits his thoughts and papers to others, he can have "no legitimate expectation of privacy." Couch v. United States, supra at 14. His thoughts and papers are no longer sacrosanct and thus are not entitled to these constitutional safeguards. In legal terms the individual has waived his right to assert these privileges.

This result occurs most frequently when a taxpayer leaves his records with a public accountant. When the taxpayer so relinquishes possession of his records, he loses his Fifth Amendment privilege with respect to such records so long as they are out of his possession. He cannot complain if the accountant is summoned to produce those records for the Internal Revenue Service. Couch v. United States, supra.

Similarly, the accountant (or in this case, the Receiver) cannot assert a Fifth Amendment privilege because the records are not incriminating as to him. The general rule is that one cannot assert constitutional rights belonging to another. Bouschor v. United States, 316 F.2d 451 (8th Cir. 1963), states:

> ...the guarantee against self-incrimination has long been characterized as a personal privilege of the witness. It was never intended to permit him to plead the fact that some third person might be incriminated by his testimony even though he were the agent of such person.

The transfer of records from Moody to Receiver was pursuant to court order and in this respect differs from a taxpayer's unilateral transfer of records to his accountant. Nonetheless, the Court has found that Moody voluntarily transferred the records. Although Moody did not agree to the receivership order, neither did he oppose it. In fact, Moody's attorney, Hill, acknowledged that a receivership, if necessary to prevent a run on the Bank, would be in the best interest of Moody. Moreover, after Hill was succeeded by McLeod as Moody's attorney, and after ample time to consider the matter had elasped, no appeal was taken from the order appointing Receiver. Under these circumstances, the analogy of this case to the accountant cases is appropriate.[1]

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1. Intervenor Moody urges upon this Court *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1969), a taxpayer-accountant case and claims its applicability here. In *Stuart*, the United States Court of Appeals for the Fifth Circuit allowed the taxpayer to claim her Fifth Amendment privilege although her records were in the hands of her accountant. The *Couch* decision may have *sub silentio* overruled *Stuart*. *Couch v. United States*, supra. (Brennan, J., concurring). Assuming the continued viability of *Stuart*, it is distinguished from

Furthermore, the transfer of any incriminating evidence to Receiver must be considered voluntary because of Moody's failure to assert his Fifth Amendment privilege as to the transmitted records. Moody asserted the privilege as to two safety deposit boxes and their contents. Those boxes were sealed and their contents were not delivered to Receiver. Other records which Moody or his counsel deemed to be incriminating could have received similar protection. Moody's waiver of the privilege as to other records must be interpreted as a voluntary relinguishment of such other records.

Finally, as a matter of law, the Court concludes that Moody voluntarily transferred his Bank's assets and records to the Receiver. This situation is most analogous to an involuntary bankruptcy in which a court transfers the assets of an individual for the benefit of both creditors and the individual, but without the individual's consent. A series of United States Supreme Court cases involving bankruptcy receiverships and IRS summonses has held that the receiver must comply with the summons and that the Fifth Amendment is not available to the bankrupt taxpayer once he has transferred his assets. E.g., Dier v. Banton, 262 U.S. 148 (1923); In the Matter of Harris, 221 U.S. 297 (1911).

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this case by its facts. The critical fact there was that the taxpayer had delivered the records to the accountant *solely* for the convenience of the Revenue Agent conducting the audit. As is clear from reading the opinion, the Court there declined to allow this act of good will toward the IRS to strip the taxpayer of her constitutional privilege. This very significant feature has been unique to the *Stuart* case, and the *Stuart* result has not recurred. See, *United States v. Mercurio*, 418 F.2d 1213 (5th Cir. 1969), aff'd sub. nom. *Donaldson v. United States*, 400 U.S. 517 (1971). The transfer of Moody's records to the Receiver in this case was independent of any IRS investigation. Thus *Stuart v. United States* does not apply here.

Moody attempts to avoid the result reached in the above cited bankruptcy cases by pointing to the differences between bankruptcy receiverships and the receivership here, citing Clark v. Delaware, 269 A.2d 59 (Del. 1970). Those differences do not appear relevant to the issues here. The distinctions made in Clark, supra, were expressly rejected in Dier v. Banton, supra, and must be rejected here.

The theory of the bankruptcy cases is that the individual has commercial obligations to society. When his actions result in a court-ordered transfer, he has put himself in the position where he must surrender his papers to satisfy these obligations. In this sense he has acted voluntarily to bring about the transfer. United States v. Hoyt, 53 F.2d 881, 885 (S.D. N.Y. 1931).

That theory is clearly appropriate here. As a banker operating with the trust and confidence of the community, Moody has the highest fiduciary and financial obligations to society. When, as here, he fails to justify that trust and confidence, and when his actions endanger his Bank's ability to satisfy his financial obligations, a receivership may be necessary in the public interest. In this case the receivership was ordered for the same reasons that a bankruptcy receivership is ordered, namely, protection of depositor accounts and protection of the Bank, a public institution (even though it be a proprietorship). Moody must be held to have voluntarily and without compulsion transferred his assets to Receiver. This Court thus concludes that Couch v. United States governs the instant case.

It is well settled law that the privilege must be invoked before the private papers or records are transferred to a

third party, or it is lost. E.g., United States v. Hoyt, supra. Accordingly, the privilege was timely asserted only as to the contents of the two locked boxes. Any of the requested records which are in those boxes are immune from Internal Revenue discovery. All of the remaining records were transferred to Receiver without objection and must be produced pursuant to the summons.

3. In addition and alternatively, the position is posed that by allowing unimpeded inspection of Bank records by the SEC, Moody waived his right to invoke the Fifth Amendment privilege and cannot now assert it as to the records reproduced by the SEC. In response to this, the Intervenor claims that no waiver occurred. Moody asserts as defects that the subpoena was not served on him personally; and, that access to the records was provided by a subordinate, not by Moody personally. Moody urges that his August 3 letter allowing the investigation is ineffective to cure these defects.

Such contention is answered by the Court's Findings of Fact. Based on the evidence presented, the Court has found that the decision to allow full access to the records was made by Moody himself with full instruction as to the legal consequences. The openness with which Moody exposed the Bank records has been emphasized. The SEC demonstrated considerable concern that Moody have full legal assistance. The extent of the examination and potential criminal sanctions were spelled out to Moody's lawyer and to his agents before compliance was demanded. The Court has found that Mr. Bridges was present and representing Moody when the Bank records were opened to to the SEC but failed to interpose any objection. The fact that Moody was not served personally with the SEC sub-

poena, Harrison v. Prather, 404 F.2d 267 (5th Cir. 1968), is not germane here. The important point is that Moody himself knew of the factual and legal consequences of the investigation but failed to make objection. Technical errors by the SEC, if any, cannot mask the effect of Moody's acts and should not prejudice the IRS here.

Although Bridges, as Moody's attorney, stated that all rights were reserved and not waived, such statements are inconsistent with the action taken. A blanket claim of a right is seldom effective. See United States v. Finley, 434 F.2d 596 (5th Cir. 1970). The completeness with which the subpoena was compiled belies any reservation of Fifth Amendment rights. The Court has found that Moody opened his Bank records without objection, allowing full inspection and reproduction by the SEC. He thereby waived his Fifth Amendment privilege as to those documents which were reproduced.

Although waiver of the privilege against self-incrimination during one official investigation does not normally bar its assertion during a later investigation, here the waiver was extended to the allowance of extensive document copying during the investigation. The record reflects that the IRS has been furnished some, and is free to view the results of all of such copying, from the microfilm records of the SEC. For the Court to refuse access to the originals would be illogical and irrational. Therefore, the Court concludes that Moody irrevocably waived his Fifth Amendment privilege as to those documents copied by the SEC and that independently of Conclusion of Law #2, the Receiver must produce those of the requested records which were copied by the SEC in its investigation.

4. Because of the correctness of Moody's returns is still at issue, the criminal nature of the investigation projected to be done by Culver does not bar production.

The applicable statute, 26 U.S.C. §7602 under which the IRS proceeds provides as follows:

> For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability.

Moody contends that the predominantly criminal overtones of the projected Culver investigation is barred for lack of a "valid and proper purpose." United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969). In 1963, the Supreme Court, in dictum, approved the judicial gloss engrafted by circuit courts to the effect that a taxpayer can successfully resist the summons where "the material is sought for the improper purpose of obtaining evidence for use in a criminal prosecution." Reisman v. Caplin, 375 U.S. 440 (1963), citing Boren v. Tucker, 239 F.2d 767 (9th Cir. 1956).

Subsequent circuit court cases differed in interpretation of this dictum. The Fifth Circuit has indicated that the summons would not be enforced if the investigation were predominantly criminal in nature. Venn v. United States, 400 F.2d 207 (5th Cir. 1968). Other circuit courts have enforced summonses in principally criminal investigations so long as the correctness of a return (a civil question) was still at issue. E.g., United States v. Couch, supra. Perhaps significantly, all the reported cases

which have come to the Court's attention have enforced the summons. E.g., United States v. Hays, 408 F.2d 932 (7th Cir. 1969).

In 1971 the Supreme Court, in Donaldson v. United States, 490 U.S. 517 (1971), dealt with the varying interpretations of Reisman. The Court held that " . . . only where the sole object of the investigation is to gather data for criminal prosecution," is the petition to enforce the summons to be refused. The decision implied that this is true only when a criminal prosecution has begun. Until this time, it is impossible to negate the possibility of a civil assessment for back taxes. See United States v. DeGrasa, 405 F.2d 926 (3rd Cir.) cert. den. 394 U.S. 973 (1969). Thus, unless a recommendation to prosecute has been made, the investigation retains a sufficient civil purpose, and use of §7602 is proper. See United States v. White, 326 F.Supp. 459 (S.D. Tex. 1971) (Bue, J.); and Couch v. United States, supra, slip op. at 5, n. 8.

Viewed in this light, Moody's objection that the investigation is for an improper purpose must be denied. Although Special Agent Culver's work will be criminal in orientation, the civil aspects of Moody's case are still present because Revenue Agent Coyle's work which will proceed concurrently is not complete. So long as both an auditor and a special agent are working on the case, it retains the requisite civil element. The summons was not issued for an improper purpose and must be enforced.

5. The summons is reasonably specific and narrow in naming the requested records. The records sought are all reasonably necessary to a full and complete investigation by the Internal Revenue Service. The request for the records was not made for harassment purposes.

Intervenor Moody claims the IRS has access to many of the documents because copies of them are in the SEC files and among the Revenue Agent's papers. Therefore, Moody claims the IRS does not need the original documents. Moody also contends, citing Jones v. Securities & Exchange Commission, 298 U.S. 1 (1936) and other cases, that the subpoena is unreasonably broad. Moody concludes that the summons constitutes harassment and that enforcement must be refused.

In substance, these objections claim an unreasonable search in violation of the Fourth Amendment. The contentions are without merit.

No rule of law bars an IRS summons simply because copies of the records may be in another agency's files. The other agency, involved in an inquiry of its own, may omit reproduction of documents essential to a tax investigation.

The need for effective enforcement of tax laws justifies clothing the Service with considerable discretion in conducting its investigations. See United States v. Powell, supra. Thus, during the present investigation, the Special Agent may review documents which the Revenue Agent has already examined. United States v. Crespo, 281 F.Supp. 928 (D. Md. 1968); compare United States v. Pritchard, 438 F.2d 969 (5th Cir. 1971).

The summons is not overboard. See United States v. Giordano, 419 U.S. 564 (8th Cir.) cert. den. 397 U.S. 1037 (1970). It is considerably narrower and more explicit than the subpoenas involved in cases cited by Moody. E.g., Jones v. Securities & Exchange Commission, supra. The Court has found as a fact that Moody has

not been harassed by the IRS. See, United States v, Hays, supra.

For the foregoing reasons, the Court concludes that enforcement of the summons will not violate Intervenor's Fourth Amendment rights.

The foregoing constitutes the Courts findings of fact and conclusions of law.

The Clerk shall file this Memorandum and Order and send copies to all counsel.

DONE at Houston, Texas, this the 16 day of January, 1973.

James Noel
Judge

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1431

UNITED STATES OF AMERICA and
GERALD T. CULVER, Special Agent,
Internal Revenue Service,
Plaintiffs-Appellees,

versus

E. O. BUCK, Receiver for W. L. MOODY and
COMPANY, Bankers,
Defendant,

versus

SHEARN MOODY, JR.,
Intervenor-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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(July 23, 1973)

Before AINSWORTH, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM: After consideration of the briefs, trial record, and memorandum opinion of the District Judge (356 F.Supp. 370), we conclude that the district court should be AFFIRMED.

ORDER

(Caption Omitted)

(Filed January 16, 1973)

BE IT REMEMBERED, that on this day came on to be heard the petition of the United States of America, by and through its agent, Gerald T. Culver, Special Agent of the Internal Revenue Service, for enforcement of an administrative summons issued by the service and served upon Respondent, E. O. Buck, Temporary Receiver for W. L. Moody & Co., Bankers (Unincorporated);

THAT having heard the evidence presented by Petitioners and by Intervenor, Shearn Moody, Jr., and having considered the arguments and authorities presented by all parties, the Court is of the view that such petition must be granted;

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that Respondent E. O. Buck comply with the summons by appearing before Special Agent Culver in the place of business of W. L. Moody & Co., Bankers (Unincorporated), at 2302 Church Street, Galveston, Texas, on a convenient date specified by Culver, and there producing the records of said W. L. Moody & Co., Bankers (Unincorporated) which are designated in the summons.

The Clerk shall enter this Order and furnish a copy to all counsel.

DONE at Houston, Texas, this the 16th day of January, 1973.

JAMES NOEL
Judge

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 73-1431

D. C. Docket No. 72-G-3

UNITED STATES OF AMERICA and
GERALD T. CULVER, Special Agent,
Internal Revenue Service,
Plaintiffs-Appellees,

versus

E. O. BUCK, Receiver for W. L. MOODY and
COMPANY BANKERS,
Defendant,

versus

SHEARN MOODY, JR.,
Intervenor-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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Before AINSWORTH, GODBOLD and INGRAHAM,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that intervenor-appellant pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

July 23, 1973

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 73-1431

UNITED STATES OF AMERICA and
GERALD T. CULVER, Special Agent,
Internal Revenue Service,
Plaintiffs-Appellees,

versus

E. O. BUCK, Receiver for W. L. MOODY and
COMPANY BANKERS,
Defendant,

versus

SHEARN MOODY, JR.,
Intervenor-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(August 13, 1973)

Before AINSWORTH, GODBOLD and INGRAHAM, Circuit Judges.

PER CURIAM:

It IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

CONSTITUTIONAL PROVISIONS AND STATUTES

§ 7602. Examination of books and witnesses

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Aug. 16, 1954, C. 736, 68A Stat. 901.

TEXT OF AMENDMENTS TO THE CONSTITUTION

AMENDMENT [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

PLEADINGS, SUBPOENAS AND EVIDENCIARY ORDERS

United States District Court

SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

UNITED STATES OF AMERICA and
GERALD T. CULVER, Special Agent,
Internal Revenue Service,

Petitioners,

v.

E. O. BUCK, Receiver for W. L. Moody and Company,
Bankers, Unincorporated,

Respondent.

Misc. Civil Action 72-G-3

PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

(Filed Nov. 16, 1972)

NOW COMES the United States of America and Special Agent Gerald T. Culver, Internal Revenue Service, by their attorney, Anthony J. P. Farris, United States Attorney for the Southern District of Texas, and respectfully shows unto this Court as follows:

1. This is a proceeding brought under the authority of 26 U.S.C. 7402(b) and 7604(a) (1954), to judicially enforce an Internal Revenue Service summons.

2. The Petitioner, Gerald T. Culver, is a Special Agent with the Intelligence Division of the Internal Revenue Service employed in Austin, Texas, with post of duty in Houston, Texas, and is authorized to issue Internal Revenue Service summonses under the authority of Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C. 7602), and Treasury Regulations, Section 301.7602-1 (26 CFR 301.7602-1).

3. The Respondent, E. O. Buck, is the Receiver for W. L. Moody and Company, Bankers, Unincorporated, a sole proprietorship engaged in the banking business in Galveston, Texas within the jurisdiction of this Court.

4. Petitioner, Special Agent Gerald T. Culver, has been conducting an investigation to ascertain the correctness of the income tax liabilities of Shearn Moody, Jr., for the years 1968, 1969, 1970, and 1971. W. L. Moody and Company, Bankers, Unincorporated, is a sole proprietorship owned and operated by the taxpayer, Shearn Moody, Jr.

5. The Respondent, E. O. Buck, as Receiver for W. L. Moody and Company, Bankers, Unincorporated, is in possession of the books, records and papers of W. L. Moody and Company, Bankers, Unincorporated, all of which relate to the income tax liabilities of the taxpayer, Shearn Moody, Jr. for the years 1968, 1969, 1970 and 1971.

6. On October 31, 1972 at 11:15 A.M. a summons was issued by the Petitioner, Special Agent Gerald T. Culver, directing the Respondent, E. O. Buck, the Receiver for W. L. Moody and Company, Bankers, Unincorporated, to appear before the Petitioner, Special Agent Gerald T. Culver on November 10, 1972 at 2:00 P.M.,

to testify and to produce for examination the books, records, and papers of W. L. Moody and Company, Bankers, Unincorporated, all as more fully set forth in the attached affidavit and summons.

7. An attested copy of the summons was personally served on the Respondent, E. O. Buck by the Petitioner, Special Agent Gerald T. Culver on October 31, 1972 by handing it to the Respondent E. O. Buck. The summons issued to the Respondent E. O. Buck is attached hereto and incorporated herein as Exhibit A.

8. Until the date of this petition the summons described in paragraph 7 above has not been complied with.

9. It was and now is essential to the determination of the income tax liabilities of the taxpayer, Shearn Moody, Jr., for the years 1968, 1969, 1970 and 1971 that the Respondent E. O. Buck, Receiver for W. L. Moody and Company, Bankers, Unincorporated, be required to testify and produce the books, records and papers demanded as is evidenced by the affidavit of the Petitioner Special Agent Gerald T. Culver attached hereto and incorporated herein as part of this application.

WHEREFORE, the Petitioners respectfully pray:

1. That this Court enter an order directing the Respondent E. O. Buck, Receiver for W. L. Moody and Company, Bankers, Unincorporated, to show cause, if any he has, why he should not comply with and obey the aforementioned summons and each and every requirement thereof.

2. That the Court enter an order directing the Respondent, E. O. Buck, Receiver for W. L. Moody and

Company, Bankers, Unincorporated, to obey the aforementioned summons and each and every requirement thereof, and order his attendance and testimony and the production of the books, records and papers as required and called for by the terms of the summons, before Special Agent Gerald T. Culver, or any other proper officer of the Internal Revenue Service at such time and place as may hereafter be fixed by Special Agent Gerald T. Culver, or any proper officer of the Internal Revenue Service.

3. That the Court render such other and further relief as is just and proper.

ANTHONY J. P. FARRIS
United States Attorney

By: WILLIAM L. BOWERS, JR.
Assistant United States Attorney

AFFIDAVIT

GERALD T. CULVER, a Petitioner herein, being first duly sworn deposes and states:

1. That he is a Special Agent with the Intelligence Division of the Internal Revenue Service, with post of duty in Houston, Texas, and performing his duties under the District Director of Internal Revenue for the District of Austin, Texas.

2. That in his capacity as a Special Agent he was assigned to investigate the tax liabilities of Shearn Moody, Jr. for the years 1968, 1969, 1970 and 1971.

3. That pursuant to such investigation, on October 31, 1972 at 11:15 A.M. he issued an Internal Revenue Service summons directing E. O. Buck, Receiver for W. L. Moody and Company, Bankers, Unincorporated, who is in possession of the books and records of W. L. Moody and Company, Bankers, Unincorporated, to appear on November 10, 1972 at 2:00 P.M., before Special Agent Gerald T. Culver at the Internal Revenue Service Office, United States Postoffice Building, Galveston, Texas, and then and there to give testimony and produce the records as called for by the summons attached hereto as Exhibit A.

4. That on October 31, 1972 at 11:15 A.M. he personally served the attached summons upon E. O. Buck, Receiver for W. L. Moody and Company, Bankers, Unincorporated, by handing an attested copy to E. O. Buck.

5. That until the date of this affidavit E. O. Buck has not complied with the summons issued to him.

6. That the testimony and records demanded by the attached summons are necessary and essential to determine the correctness of the income tax liabilities of Shearn Moody, Jr. for the years 1968, 1969, 1970 and 1971.

GERALD T. CULVER
Gerald T. Culver
Special Agent

SWORN to and SUBSCRIBED before me this 16th day of November, 1972.

/s/ MARJOIRE N. SUTTON
Marjoire N. Sutton
Notary Public in and for
Harris County Texas

(SEAL)

(My Commission Expires June 1, 1973)

Certificate of Service of Summons

(Pursuant to Section 7603, Internal Revenue Code)

I certify that I served the summons shown on the front of this form on:

Date	Time
October 31, 1972	11:15 a.m.

How Summons Was Served

☒ I handed an attested copy of the summons to the person to whom it was directed.

☐ I left an attested copy of the summons with the following person at the last and usual place of abode of the person to whom it was directed

Signature	Title
Gerald J. Culver	Special Agent

Sec. 7603
Service of Summons

A summons issued under section 6420(e)(2), 6421(f)(2), 6424(d)(2), or 7602 shall be served by the Secretary or his delegate, by an attested copy delivered in hand to the person to whom it is directed, or left at his last and usual place of abode; and the certificate of service signed by the person serving the summons shall be evidence of the facts it states on the hearing of an application for the enforcement of the summons. When the summons requires the production of books, papers, records, or other data, it shall be sufficient if such books, papers, records, or other data are described with reasonable certainty.

Form 3039 (Rev. 10-68)

Form 2039
(Rev. Oct. 1968)

Summons

Department of the Treasury
Internal Revenue Service

In the matter of the tax liability of

Shearn Moody, Jr.
Galveston, Texas

Internal Revenue District of Austin, Texas

Period(s) 1968, 1969, 1970, and 1971

The Commissioner of Internal Revenue

GOVERNMENT EXHIBIT

To Mr. E. O. Buck, Receiver
W. L. Moody & Company, Bankers (Unincorporated)
At Galveston, Texas

Greetings: You are hereby summoned and required to appear before Special Agent Gerald T. Culver an officer of the Internal Revenue Service, to give testimony relating to the tax liability or the collection of the tax liability of the above named person for the period(s) designated and to bring with you and produce for examination the following books, records, and papers at the place and time hereinafter set forth:

Records of W. L. Moody & Company, Bankers (Unincorporated), for the years 1968, 1969, 1970, and 1971 as follows:

1) General ledger and all subsidiary general ledgers including, but not limited to, income and expense journals, asset accounts, accounts receivable and notes receivable ledger and supporting documents.

2) Minutes of all executive and other bank management committee meetings.

3) Securities register showing additions and deletions including all supporting documents.

4) Liability ledger and all supporting documents.

(Continued to next page)

Place and time for appearance:

at Internal Revenue Office, U.S. Postoffice Bldg., Galveston, Texas

on the 10th day of November, 19 72 at 2:00 o'clock P.M.

Failure to comply with this summons will render you liable to proceedings in the district court of the United States or before a United States commissioner or magistrate to enforce obedience to the requirements of this summons, and to punish default or disobedience.

Issued under authority of the Internal Revenue Code

this 31st day of October, 19 72

Original

Gerald T. Culver — Special Agent
Signature — Title

Form 2039 (Rev. 10-68)

FORM 2039 - SUMMONS (cont'd)
In re: Shearn Moody, Jr.

5). Paid expense invoices and related expense checks.

6). Payroll general ledger and related employment tax returns.

7). Copies of information returns, Forms 1099, evidencing interest and other payments made by W. L. Moody & Company, Bankers (Unincorporated).

8). Identity of items charged against the reserve for bad debts.

9). Signature cards, ledger cards, deposit slips and cancelled checks on all accounts from which Shearn Moody, Jr., was able to make withdrawals, including, but not limited to, the following:

Financial Consultants
R & B Coin Company
Southwest Video Payroll Account
James Stoker
James Wilde
Shearn Moody Foundation
Shearn Moody Ranch
#16 Cedar Lawn
The Dollar Fund
Charles Aycock
Virginia Dietzman

10). All correspondence files.

RESPONSE OF SHEARN MOODY, JR., INTERVENOR TO PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

(Caption Omitted)

(Filed Dec. 5, 1972)

Comes now SHEARN MOODY, JR., having intervened in the above styled and numbered cause, and files this, his Response to Petitioner's Petition to Enforce Internal Revenue Service Summons, as follows:

I.

Intervenor admits the allegations of Paragraphs 1 and 2.

II.

Intervenor admits the allegations of Paragraph 3, except to point out that E. O. Buck is a Temporary Receiver only.

III.

Intervenor denies the allegations of Paragraph 4 and alleges that the paramount overriding purpose of the investigation of Special Agent, Gerald T. Culver, is to secure evidence for possible prosecution for fraud.

IV.

Intervenor admits the allegations of Paragraph 5 that Respondent, E. O. Buck, as Temporary Receiver, is in possession of certain books, records and papers of W. L. Moody & Company, Bankers (Unincorporated), but denies that they all relate to the income tax liability of intervenor for the years in question.

V.

Intervenor admits the allegations of Paragraphs 6, 7 and 8.

VI.

Intervenor denies the allegations of Paragraph 9 of said Petition and denies that Petitioner is entitled to the relief prayed for.

VII.

For further answer and by way of defense, Intervenor would show and allege as follows:

(a) That the Petition of the United States for Enforcement of Summons is not made in good faith for the mere purpose of examining taxpayer's tax liability for the years 1968, 1969, 1970 and 1971, in that the Internal Revenue Service has heretofore been furnished records of W. L. Moody & Company, Bankers (Unincorporated), upon request in connection with the audit of taxpayer's Returns for said years, until it became evident to taxpayer that the purpose of obtaining additional evidence was for the paramount purpose of obtaining evidence for criminal prosecution and/or harassment of the taxpayer.

(b) Intervenor would further show that Petitioner has, in addition to records above described and furnished to Petitioner, copies of substantially all documents and records sought herein in the possession of Petitioner, United States of America, and has had in its possession since July, 1972, copies of all or substantially all of the records and documents sought herein, so that there is no legitimate reason why the Petition filed herein should be enforced, with the attending cost, inconvenience and needless expenditure of time of all parties concerned.

(c) Since Petitioner, United States of America, has in its possession, and has had since July, 1972, copies of all or substantially all of the records sought herein, the only purpose of this proceeding that Intervenor can understand or guess is to harass the Intervenor and interrupt or prolong the temporary receivership pending before this Honorable Court.

(d) Intervenor would further show that the overriding paramount purpose of this Petition to Enforce Summons is to prevent Intervenor from asserting his Constitutional privileges under the Fourth and Fifth Amendments under the Constitution to the production of such records and to gather information and evidence for a criminal prosecution.

WHEREFORE, Intervenor respectfully prays for the relief sought in its Petition in Intervention and for such other Order as the Court may deem just and proper.

McLEOD, ALEXANDER,
POWEL & APFFEL, INC.
By V. W. McLEOD, Lead
Counsel

By BENJAMIN R. POWEL
808 Sealy & Smith Professional
Building
P. O. Box 629
Galveston, Texas 77550

ATTORNEYS FOR
INTERVENOR,
SHEARN MOODY, JR.

(CERTIFICATE OF SERVICE Omitted)

RESPONSE OF E. O. BUCK TO PETITION TO ENFORCE INTERNAL REVENUE SERVICE SUMMONS

(Caption Omitted)

(Filed Dec. 11, 1972)

COMES NOW E. O. Buck, Temporary Receiver for W. L. Moody & Co., Bankers, Unincorporated, a sole proprietorship with its principal office and place of business in Galveston, Galveston County, Texas ("Respondent"), and in response to the Petition to Enforce Internal Revenue Service Summons heretofore filed herein by the United States of America and Special Agent Gerald T. Culver, Internal Revenue Service ("Petitioners"), would respectfully show the following:

I.

The Internal Revenue Service ("IRS") summons served upon Respondent was not observed by him on November 10, the date set for his appearance, because Respondent was at that time involved in paying depositors of W. L. Moody & Co., Bankers, Unincorporated ("Bank"). Compliance with the IRS summons would have unduly hindered Respondent in the performance of that duty, and prior orders of this Court specifically protected Respondent from any such interference.

II.

The Petition to Enforce the IRS summons was filed on November 17, 1972, and originally set for hearing on November 20, 1972. At the date set for hearing, the

matter was continued at the request of Respondent until November 27, 1972. At all times prior to November 27, 1972, Respondent was in the process of closing the Bank records and preparing his Final Report and Accounting based thereon. Attempting to comply with the IRS summons during this period would also have unduly burdened Respondent in the performance of his duties.

III.

The real party at interest herein is Shearn Moody, Jr., whose Petition in Intervention has been granted herein. Further, the parties to this proceeding have entered into a Stipulation which will allow the temporary receivership to be terminated without affecting these proceedings. Therefore, E. O. Buck, Temporary Receiver, files this Response for the sole purpose of entering his appearance, and he will abide by any rulings of the Court herein.

WHEREFORE, PREMISES CONSIDERED, E. O. Buck, Temporary Receiver, prays that the Court grant him such relief as may be appropriate in the premises.

Respectfully submitted,

CHARLES SAPP
Attorney for E. O. Buck,
Temporary Receiver
510 Gulf Building
Houston, Texas 77002

(CERTIFICATE OF SERVICE Omitted)

ORDER APPOINTING TEMPORARY RECEIVER

(Caption Omitted)

(Filed Sept. 6, 1972)

This matter is before the Court on the application of the Plaintiff, Securities and Exchange Commission, for the appointment of a TEMPORARY RECEIVER for the Defendant, W. L. MOODY & CO., BANKERS, UNINCORPORATED. The Court being fully advised in the premises, it is therefore, ORDERED, ADJUDGED AND DECREED:

(1) That Emma Louise Yan, a feme sole be and hereby is appointed TEMPORARY RECEIVER of the Defendant, W. L. MOODY & CO., BANKERS, UNINCORPORATED and he is directed to collect and take charge of all of the Defendant, W. L. MOODY & CO., BANKERS, UNINCORPORATED'S assets and property, tangible and intangible, of any kind or type wherever located and which may be in the custody or possession of any agent, servant, attorney, officer, creditor or representative of said Defendant;

(2) That the said TEMPORARY RECEIVER forthwith file with the clerk of this Court a bond in the sum of $..... with sureties to be approved by the Court conditioned that he will well and truly perform the duties of his office and duly account for all monies and properties which may come into his hands and abide by and perform all things which he shall be directed to do;

(3) That until the further Order of this Court, the said TEMPORARY RECEIVER be and hereby is authorized to take and have complete and absolute control, possession and custody of all of the assets of the

Defendant, W. L. MOODY & CO., BANKERS, UNINCORPORATED;

(4) That all persons, firms and corporations including the Defendants herein named and all officers, agents, employees, attorneys and assigns of said persons, firms and corporations and said Defendants herein including any creditors or debtors of said W. L. MOODY & CO., BANKERS, UNINCORPORATED shall forthwith deliver to said TEMPORARY RECEIVER any and all of the assets of said W. L. MOODY & CO., BANKERS, UNINCORPORATED in their custody, possession and control upon presentation of a certified copy of this order;

(5) That the said TEMPORARY RECEIVER, subject to approval of the Court, shall employ such managers, agents, employees, servants, accountants and attorneys as may be necessary for the management, conduct, control or custody of the affairs of the Defendant, W. L. MOODY & CO., BANKERS, UNINCORPORATED and of the assets thereof and that said TEMPORARY RECEIVER be and he hereby is authorized to make such payments and disbursements as may be needful and proper for the preservation of the properties Defendants;

(6) That said TEMPORARY RECEIVER be and hereby is authorized to receive and collect any and all sums of money due or owing to the Defendant, W. L. MOODY & CO., BANKERS, UNINCORPORATED, in any manner whatsoever, whether the same are now due or shall hereafter become due and payable and said TEMPORARY RECEIVER be and he hereby is authorized to do such things and enter into such agreements in connection with the management, care and preservation of

the properties of the Defendant, W. L. MOODY & CO., BANKERS, UNINCORPORATED, as he may deem advisable, and is authorized to incur such expenses and make such disbursements as may in his judgment be advisable or necessary in connection with the care, preservation and maintenance of the said properties;

(7) That the TEMPORARY RECEIVER be and hereby is authorized to perform all acts required by the valid contract or contracts presently in force between W. L. MOODY & CO., BANKERS, UNINCORPORATED and any state or municipality or any agency or political subdivision;

(8) That the TEMPORARY RECEIVER be and hereby is authorized and directed to marshal the assets of the defendant, W. L. MOODY & CO., BANKERS, UNINCORPORATED and as soon as possible thereafter upon further order of the Court to cause to be paid all deposits, time, demand or saving certificates, belonging to persons or corporations who are not associates of W. L. MOODY & CO., BANKERS, UNINCORPORATED or SHEARN MOODY, JR., or controlled by such defendants either directly or indirectly whether through the ownership of voting securities, by contract or otherwise and all persons who are not of blood relations to Shearn Moody, Jr.

(9) That the Defendants herein and all creditors of said W. L. MOODY & CO., BANKERS, UNINCORPORATED and all agents, servants, employees, attorneys and assigns thereof and all sheriffs, marshals and their deputies, be and the same are hereby jointly and separately enjoined and stayed from in any way interfering with the property, assets or effects of said W. L. MOODY & CO., BANKERS, UNINCORPORATED and all per-

sons are enjoined and stayed from suing out any writs, processes, attachments, or commencing any proceedings against the said W. L. MOODY & CO., BANKERS, UNINCORPORATED, except in this action or in any way whatsoever interfering with the duties of the said TEMPORARY RECEIVER.

(10) That the Defendants herein are hereby restrained and enjoined from selling, mortgaging, giving away, transferring, or attempting to transfer or otherwise dispose of any of the assets of W. L. MOODY & CO., BANKERS, UNINCORPORATED, real and personal, tangible and intangible, during the pendency of this order.

(11) That the Defendants herein and all persons, firms, or corporations be enjoined from foreclosing upon, transferring, selling, or otherwise disposing of any of the property of W. L. MOODY & CO., BANKERS, UNINCORPORATED in their possession held as pledge or as collateral or otherwise, until further order of the Court.

IT IS FURTHER ORDERED that said Emma Louise Yan shall continue as TEMPORARY RECEIVER of W. L. MOODY & CO., BANKERS, UNINCORPORATED until further order of this Court. The Court reserves the right at any time to alter, amend, expand, modify or vacate this order.

Dated this 6th day of Sept. 1972.

JAMES NOEL

United States District Judge

True Copy I Certify
Attest:
V. BAILEY THOMAS, Clerk

By EDITH ROGERS,
Deputy Clerk

SUPPLEMENT NO. 1 TO ORDER APPOINTING TEMPORARY RECEIVER

(Caption Omitted)

(Filed Sept. 7, 1972)

BE IT REMEMBERED that in the above styled and numbered cause, this Court entered its Order Appointing Temporary Receiver on September 6, 1972, in which among other things the Court appointed Emma Louise Yon, a feme sole, Temporary Receiver, reference being hereby made to said Order for all purposes. Emma Louise Yon has tendered her resignation as Temporary Receiver.

E. O. Buck, whose personal business address is in the Gulf Building, Houston, Texas, telephone number 222-0585, has expressed his willingness to accept appointment as Temporary Receiver herein; and, Charles Sapp, whose business address is Gulf Building, Houston, Texas, telephone number 223-4151, has expressed to the Court his willingness to accept appointment as attorney for said Receiver.

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED:

A.

Emma Louise Yon, a feme sole, whose resignation is hereby accepted, is hereby fully released from any further obligation as such under said Order.

B.

E. O. Buck is hereby appointed Temporary Receiver and he shall forthwith file with the Clerk of this Court

a bond in the sum of Twenty-five Thousand Dollars ($25,000) with securities to be approved by the Court conditioned that he will well and truly perform the duties of his office and duly account for all moneys and properties which may come into his hands and abide by and perform all things which he shall be directed to do.

C.

Pursuant to the request of said Temporary Receiver for the appointment of an attorney to represent him, Charles Sapp is hereby designated and appointed Attorney.

D.

As herein supplemented, said Order Appointng Temporary Receiver is hereby ratified and confirmed; and, said Temporary Receiver and said Attorney shall have all the rights, powers and duties accruing to and imposed upon them by said Order Appointing Temporary Receiver.

DONE at Houston, Texas, this 7th day of September, 1972.

JAMES NOEL
United States District Judge

True Copy I Certify
Attest:
V. BAILEY THOMAS, Clerk

By EDITH ROGERS,
Deputy Clerk

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
NOV 16 1973
MICHAEL RODAK, JR., CLERK

No. 73-531

In the Supreme Court of the United States

OCTOBER TERM, 1973

SHEARN MOODY, JR., PETITIONER

v.

UNITED STATES OF AMERICA AND GERALD T. CULVER, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
SCOTT P. CRAMPTON,
Assistant Attorney General,
PAUL M. GINSBURG,
DANIEL F. ROSS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-531

SHEARN MOODY, JR., PETITIONER

v.

UNITED STATES OF AMERICA AND GERALD T. CULVER, SPECIAL AGENT, INTERNAL REVENUE SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the court of appeals (Pet. App. 42) is not reported. The memorandum and order of the district court (Pet. App. 21-41) is reported at 356 F. Supp. 370.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1973. A petition for rehearing was denied on August 13, 1973. The petition for a writ of certiorari was filed on September 24, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

526-504—73——1

QUESTIONS PRESENTED

1. Whether an Internal Revenue Service summons issued to petitioner's receiver in the course of a civil tax audit and prior to a recommendation of any criminal prosecution was valid and enforceable.

2. Whether petitioner can claim Fourth and Fifth Amendment rights in documents which he voluntarily turned over to a temporary receiver.

STATEMENT

Following the refusal of E. O. Buck, receiver for W. L. Moody & Company, Bankers (Unincorporated), to comply with an Internal Revenue Service summons issued pursuant to Section 7602 of the Internal Revenue Code of 1954, Special Agent Culver and the United States commenced this proceeding to enforce the summons under Section 7604 of the Code. The summons was issued by Special Agent Culver. Petitioner Shearn Moody, Jr., intervened as the real party in interest (Pet. App. 21). The district court enforced the summons and the court of appeals affirmed *per curiam* (Pet. App. 41–42).

W. L. Moody & Company is an assumed name under which petitioner engaged in the banking business as a sole proprietor. Pursuant to court order, E. O. Buck was appointed temporary receiver of W. L. Moody & Company on September 7, 1972, and took possession of substantially all of the records of the banking business (Pet. App. 63–68). The summons at issue concerns only those records in the possession of the receiver.

The district court entered the order appointing the temporary receiver because of concern that a proposed Securities and Exchange Commission action enjoining the bank from further violations of the securities laws might cause serious financial loss to the bank and depositors. Petitioner neither consented to nor opposed the order, and he did not assert any constitutional privilege against the transfer of assets (including records) to the receiver.[1] The district court found that "[i]n substance, the transfer of such property and assets (including the Bank records) was voluntary" (Pet. App. 26–27).

The receivership arose after a Securities and Exchange Commission investigation into the affairs of W. L. Moody & Company. Pursuant to the investigation, on July 10, 1972, a Securities and Exchange Commission subpoena addressed to W. L. Moody & Company was served on E. Douglas McLeod, executive vice president. On July 13, 1972, Rodger Bridges, an attorney, appeared at the bank and stated to the Securities and Exchange Commission attorneys that he represented the bank. Before making any records available, Bridges stated that he was aware of the constitutional privilege to refuse to comply with the Securities and Exchange Commission subpoena but that the records would be produced voluntarily (Pet. App. 23–24).

[1] Petitioner made a timely claim of Fifth Amendment privilege only with respect to some records which were sealed in safety deposit boxes at the bank building and have not been in the possession of the receiver. The government has made no attempt to reach those sealed records (Pet. App. 25, 27–28).

Until the appointment of the receiver on September 7, 1972, the Securities and Exchange Commission personnel had access to all of the bank records and they made copies of many of the records. On August 3, 1972, petitioner himself was served with a Securities and Exchange Commission subpoena, and at that time he executed a letter stating that "it is agreeable with me for this investigation by the Securities and Exchange Commission to continue until further notice is given by me to the contrary." No contrary notice was given (Pet. App. 24–25).

After the appointment of the receiver, the Internal Revenue Service assigned Special Agent Culver to supervise the investigation with Revenue Agent Robert Coyle, who had been investigating the correctness of petitioner's income tax returns for 1969 and 1970 (Pet. App. 28–29). Culver issued the summons at issue one month later in October 1972. Special Agent Culver testified that he had made no recommendation for criminal prosecution of petitioner (Tr. 40).[2]

Because of the continued investigation by Revenue Agent Coyle into the correctness of petitioner's tax returns, the district court found that the Internal Revenue Service inquiry had the "requisite civil element" to support enforcement of the summons (Pet. App. 39). The court also found that petitioner had relinquished his right to assert a Fifth Amendment privilege in the documents in the receiver's possession be-

[2] "Tr." references are to the transcript of proceedings in the district court contained in the record on appeal.

cause he had voluntarily turned them over to the receiver (Pet. App. 31–36). Alternatively, the court held that he had waived his privilege by allowing inspection of the documents by Securities and Exchange Commission attorneys (Pet. App. 36–37).

ARGUMENT

1. In concluding that the Internal Revenue Service summons was properly enforceable, both courts below correctly applied the standard announced in *Donaldson* v. *United States,* 400 U.S. 517, that "under § 7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution" (400 U.S. at 536). Here, as previously noted, no recommendation for prosecution was made, and petitioner does not contend otherwise. However, he asserts (Pet. 9) that the sole purpose of the summons was to secure evidence to prosecute him for criminal fraud. In support of his argument, petitioner cites the district court's statement (Pet. App. 29) that the investigation was "entirely criminal in nature with the object of discovering and proving tax fraud by the taxpayer."

This statement, taken out of context from the district court's detailed memorandum and order (Pet. App. 21–41), does not fairly represent its characterization of the tax investigation. To the contrary, the district court found that there were civil aspects to the inquiry since it stated that "the correctness of Moody's returns is still at issue" (Pet. App. 38). It further found that "the civil aspects of Moody's case

are still present because Revenue Agent Coyle's work which will proceed concurrently is not complete." As a result, the district court concluded that "[s]o long as both an auditor and a special agent are working on the case, it retains the requisite civil element" (Pet. App. 39).

These findings and conclusions are completely in accord with *Donaldson,* which held that the fact that the investigation may uncover evidence of what may prove to be criminal conduct does not bar the use of the administrative summons prior to a recommendation for prosecution.[3] As long as the determination of civil tax liability is one of the purposes for the issuance of a summons, the courts of appeals are agreed that the *Donaldson* test of good faith has been met. See, *e.g., United States* v. *Cleveland Trust Co.,* 474 F. 2d 1234, 1236 (C.A. 6), certiorari denied *sub nom. Miceli* v. *United States,* No. 72–1606, October 9, 1973; *United States* v. *Wall Corp.,* 475 F. 2d 893, 894–895 (C.A. D.C.); *United States* v. *Richardson,* 469 F. 2d 349, 352 (C.A. 10); *United States* v. *National State Bank,* 454 F. 2d 1249, 1251–1252 (C.A. 7); *United States* v. *Couch,* 449 F. 2d 141, 143 (C.A. 4), affirmed, 409 U.S. 322; *United States* v. *Troupe,* 438 F. 2d 117, 119 (C.A. 8).

[3] A recommendation for prosecution does not occur until the case is referred to the Department of Justice. "While a criminal investigation remains solely within the Internal Revenue Service, the civil aspects are inextricably associated with the criminal." *United States* v. *Billingsley,* 469 F. 2d 1208, 1209–1210 (C.A. 10). Any discovery of fraud would have the important civil consequences of the determination of deficiencies and penalties under Section 6653 of the Code.

2. Petitioner's Fifth Amendment claims[4] (Pet. 9–14) have long been foreclosed by *Dier* v. *Banton*, 262 U.S. 147, involving a grand jury subpoena seeking books and records addressed to a receiver in an involuntary bankruptcy. There, the Court held that an individual's right to claim a Fifth Amendment privilege in his books and records ceased even when possession and control of the books and records was transferred involuntarily to a receiver (262 U.S. at 149–150). Given petitioner's failure to contest the transfer of the bank's records to the receiver and the district court's finding (Pet. App. 27) that the transfer was voluntary, the decision below followed *a fortiori* from *Dier*.

The fact that the receiver took no title to the books and records is immaterial.[5] This Court has repeatedly rejected the contention that mere title—without possession—can serve as the basis for a Fifth Amendment privilege in documents. *Couch* v. *United States*, 409 U.S. 322, 331–335, and cases cited therein.[6] As a

[4] Despite petitioner's assertions to the contrary (Pet. 2), it is also well settled that an Internal Revenue summons directed to a third party is not subject to a Fourth Amendment challenge. *Donaldson* v. *United States*, *supra*, 400 U.S. at 522, and cases cited therein.

[5] Petitioner's attempt (Pet. 11) to distinguish *Dier* on the ground that the receiver in that case had title to the books and records is without merit. The Court specifically stated that "the books and papers were in the hands of the Receiver who ha[d] no title * * *" (262 U.S. at 149).

[6] To the extent that *Clark* v. *State of Delaware*, 269 A. 2d 59 (Del.), relied on by petitioners (Pet. 13), appears to turn on the fact that a temporary receiver did not hold title to records in his custody, the decision is contrary to this Court's holdings in *Dier* and *Couch*.

result of the receiver's possession, "the ingredient of personal compulsion against an accused" necessary to support a Fifth Amendment claim did not exist. *Couch* v. *United States, supra,* 409 U.S. at 329.

Moreover, petitioner had no legitimate expectation of privacy in these records, which were voluntarily turned over to the receiver to be used by him as he saw fit in discharging his duties.[7] The receiver was responsible to the district court and not to petitioner. Petitioner had no right under the Order Appointing Temporary Receiver (Pet. App. 63–68) either to exercise any control over the receiver or to prevent any disclosure of the records which the receiver might choose to make. Likewise, he had no right to demand or regain possession of the records until the receivership was terminated or modified. This was no mere fleeting divestment of possession for the limited purpose of passive custodial safekeeping by another, cf. *Schwimmer* v. *United States,* 232 F. 2d 855 (C.A. 8), certiorari denied, 352 U.S. 833; *United States* v. *Guterma,* 272 F. 2d 344 (C.A. 2), which this Court has indicated might constitute "constructive possession" for Fifth Amendment purposes. See *Couch* v. *United States, supra,* 409 U.S. at 333–334, n. 16.

3. Finally, petitioner's complaints (Pet. 15–19) concerning actions taken by the Securites and Exchange Commission before appointment of the receiver are

[7] For example, in the Order Appointing Temporary Receiver, the receiver is directed to "marshal the assets of the defendant, W. L. Moody and Co., Bankers, Unincorporated, and as soon as possible * * * cause to be paid all deposits, time, demand or saving certificates * * *" (Pet. App. 65).

irrelevant to the enforceability of the Internal Revenue Service summons. Whatever privileges petitioner may have had against the actions of that agency were waived by attorney Bridges' statement before the Securities and Exchange Commission that although he was aware of the bank's right to refuse to comply with the Securities and Exchange Commission subpoena, he would not object to its compliance (Pet. App. 24) and by petitioner's subsequent letter to the Commission (Pet. App. 25).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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